No. 2870

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

VACHON & STERLING (a co-partnership), et al.,

Plaintiffs in Error,

vs.

NORTHERN NAVIGATION COMPANY (a corporation),

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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Statement of the Case.

Plaintiffs in error appeal to this court from the judgment of the District Court of Alaska, Fourth Division, sustaining the demurrer to the plaintiffs' amended complaint. The action was brought upon an account stated founded upon two causes of action, the first alleging that in March, 1907, the plaintiffs entered into a contract with the Northern Commercial Company to transport for the plaintiffs 1500 tons of merchandise from Seattle, Washington, to Chena, Alaska. That the defendant failed to deliver to plaintiffs part of the 1500 tons of

merchandise and thereupon a controversy arose which was adjusted on or about the 6th day of July, 1908, at Fairbanks and an account was stated between plaintiffs and defendant by which a balance of $853.99 was found to be due from defendant to plaintiffs.

The second cause of action contains the same allegations and alleges a balance found to be due on an account stated arising out of the same shipment amounting to $677.82.

The defendant in the lower court demurred to each account upon three grounds:

1. That the complaint did not state a cause of action.

2. That each cause of action showed upon its face that it was based upon an alleged account stated arising out of the breach of contract, and that a breach of contract cannot be used as the basis of an account stated; and

3. That each cause of action showed upon its face that it was barred by the statute of limitations.

Argument.

The plaintiffs in error state on page 2 of their brief that the defendant in error did not rely upon the statute of limitations but that defendant contended for the first and second grounds of demurrer, which were in effect that no cause of action could be maintained on an account stated arising out

of a breach of contract. It is not true that the defendants in the court below did not rely upon the statute of limitations and there is nothing in the records which supports such a statement. It will be perceived that the ground of demurrer founded upon the statute of limitations was a very essential part of the demurrer for an obvious reason. An examination of the complaint discloses the fact that the contract between the plaintiff and defendant was entered into in March, 1907. The complaint was filed March 14, 1914, more than six years after the date of entering into the contract out of which the cause of action arose. Under Section 838 of the Compiled Laws of the Territory of Alaska an action upon a contract or liability, express or implied, is barred by limitation in six years. Thus it will be seen that unless plaintiffs in error could sustain their position that an account was stated between the parties in the month of July, 1908, for the first cause of action, and April 15, 1908, for the second cause of action, the causes of action arising out of the original contract would have been barred by limitation.

Plaintiffs in error's legal position is that in a case of this kind and account may be stated between the parties even though the cause of action is one for liquidated damages where the amount of damages is capable of definite ascertainment by reference to the market value of the property involved. Although the claim of the plaintiffs when it arose was an unliquidated claim it could be made certain

by determining the cost price of the goods not delivered, the freight paid thereon as shown by the freight receipts and adding legal interest, thereby definitely fixing the amount due to plaintiffs in error by defendant in error.

The authorities cited by counsel for plaintiffs in error do not support this contention. The sum and substance of the principle for which counsel contend amounts to this, that in any case where one person has a claim for unliquidated damages against another the former may by presenting a claim showing the amount of damages which he claims to have sustained put the other to the necessity of disputing the account or accepting the alternative of becoming liable upon an account stated for items of damage.

We will first consider the law on the subject as we find it in the text writers. They state the rule in substantially the same language as is contained in the following quotation:

> "Since an account stated implies some previous indebtedness it follows that an account cannot be stated on unliquidated damages inasmuch as they cannot be considered a subsisting debt and this applies to damages for breach of contract where there has been no actual settlement or adjustment between the parties."

1 Ruling Case Law, p. 208;

1 Corpus Juris, p. 700, sec 308;

1 Cyc., p. 366.

The *Van Bebber* case referred to by counsel in their brief, and stated to be the decision on which the lower court sustained the demurrer to the complaint without leave to amend, is the case of *Van Bebber v. Plunkett,* 26 Ore. 562; 38 Pac. 707; 27 L. R. A. 814. The facts are as stated on page 6 of the brief of plaintiffs in error. The parties to that action agreed to pay a stipulated amount in settlement of an unliquidated claim. The issue involved was as to whether or not an account could be stated upon the facts set forth in the bill of exceptions. The court after stating various definitions of an account stated says:

> "Recurring to the facts of this case, it is apparent that the obligation of the defendants to construct the fence in question was not a debt due and owing from the defendants to plaintiff; it was merely a demand for unliquidated damages for breach of contract, and hence was not a proper subject upon which to base an account stated. To test the question as to the correctness of this conclusion, suppose the plaintiff had sued the defendants upon their agreement to build the fence, and for damages for their default. Would it be a good defense to plead an account stated with reference thereto, without also showing payment of the amount found to be due? In other words, is the mere statement of the account as alleged a discharge of the old cause of action for breach of contract? Unmistakably not. And, inasmuch as a new cause of action is not given until the old is discharged, it follows that the action upon an account stated cannot be maintained. The alleged account stated amounts to an accord, but an accord without satisfaction is no defense

to the original action. An accord with satisfaction, however, gives a new action, and the old is barred. 'A claim or demand may be satisfied by the party delivering, paying, or doing, and the claimant accepting, something different from that which is owing or claimed, if the parties so agree. It is a substantial payment. When such agreement is executed,—carried fully into effect,—the original demand is cancelled, completely satisfied, and extinguished. It is thus discharged by what the law denominates "accord and satisfaction". It is a discharge of the former obligation or liability by receipt of a new consideration, mutually agreed on.' *1 Sutherland, Damages,* 425. Again suppose the plaintiff has sent to defendants a statement in writing of his claim against them for $300 for building this fence, and the defendants had retained it an unreasonable or any length of time without objection, would a promise to pay such sum arise by implication? Undoubtedly not. If such were the rule, it would be an easy matter for any claimant to convert an action for unliquidated damages, whether arising from contract or tort, into an action upon a money demand, wherein it would not be permissible to inquire into the original cause of action. Every person against whom such a claim is made would be compelled to be constantly on the alert, and make due and timely objection, in order to prevent an undue advantage being taken of him. The doctrine of an account stated cannot be carried to this extent. A single item, not of a debt due and owing, but of an unliquidated claim of damages for the breach of a parol or simple contract, cannot form basis for an account stated."

The former case appears to be directly in point and adverse to the contention of plaintiffs in error.

It holds unqualifiedly that the retention by the defendant of a statement of plaintiffs' claim for any length of time without objection would not give rise to a promise to pay the amount by implication.

Another and more recent decision goes still further,

Pudas v. Mattola, 138 N. W. 1052; 45 L. R. A. N. S. 534.

In this case the plate glass front of plaintiff's place of business had been broken. The plaintiff claimed the defendant was one of the parties who committed the damage. Thereafter negotiations were had which plaintiff claims resulted in an agreement on the part of the defendant to pay him a stipulated amount as his share of the damages. Defendant failed to pay and thereafter plaintiff instituted suit against him upon an account stated.

The only issue before the court is whether or not this transaction could be considered as a foundation for an action of an account stated *in assumpsit.* The court says the doctrine of the account stated was originally founded upon the practice among merchants and continues after reviewing the *Van Bebber* case hereinabove referred to (p. 538).

> "The only distinction between the Oregon case above cited and the instant case is that the former grew out of a settlement of unliquidated damages arising from the breach of a contract, and the latter from a plain

settlement of unliquidated damages arising from a tort.

"The basis of an account stated must always be a balance or amount due upon a subsisting indebtedness. This was the principle upon which the action upon an account stated was founded. Therefore *a settlement of an unliquidated claim for damages arising either from the breach of a contract or from a tort cannot become the subject of an account stated.* Our attention is not called to a single authority which holds to the contrary, and in a thorough search we have been unable to find one. It was unanimously held by the court of exchequer, in an opinion written by Lord Abinger, C. B., as follows: 'Then as to the account stated: I have often observed that there is a good deal of confusion in the book on questions of account stated,—not the older books, but the modern ones; they lay down this, that where there is a promise to pay a sum of money as due from A. to B., it is evidence of an account stated, which means this, that the simple promise, if it stand unexplained and uncontradicted, is evidence to go to a jury that the plaintiff claims that sum to be due, and that there are matters of accounts between the parties; it does not go further than that; and it is only when you come to look at the facts on which the promise was made that you are enabled to see whether it is an account stated or not.' Here there was nothing due from the defendant to the plaintiffs at all; the only thing in respect of which they had a claim upon him was upon his promise and they might have had an action against him for not performing that promise, because no doubt it was made upon a good and sufficient consideration; but it was not in the nature of any debt due from the one to the other at all."

Lubbock v. Tribe, 3 Mees. & W. 607-613.

The same doctrine was announced earlier in

Tucker v. Barrow, 7 Barn. & C. 624; 1 Mann & R. 518;

Moody & M., 139, 3 Car. & P. 85; 6 L. J. K. B. 121.

> "In our opinion, upon this record, it may be stated as a matter of law that the claimed settlement relied upon by plaintiff was not an account stated, and no recovery can be had in this action."

Other authorities to the same effect are as follows:

Fraley v. Bispham, 10 Pa. St. 320; 51 Am. Dec. 486;

Note to *Jasper Trust Company v. Laupkin,* 136 Am. St. Rep., pp. 41-42;

Pratt v. Bryant, 20 Vt. 333;

Parker v. Clemons, 80 Vt. 521; 68 Atl. 646;

Charnley v. Sibley, 20 C. C. A. 157; 73 Fed. 980.

Authorities Relied Upon by Plaintiffs in Error.

On page 5 of the brief of plaintiffs in error, certain authorities are referred to to sustain plaintiffs in error's position that the distinction between the cases there cited and the *Van Bebber* case is that in the case at bar the damages were capable of being made certain by reference to the market value or other known and accepted standard of comparison.

It is contended that the *Van Bebber* is opposed to the weight of authority as shown by the notes ap-

pended to the report of the case in Vol. 27, L. R. A. Counsel do not appear to attach sufficient importance to authorities holding contrary to the *Van Bebber* case to refer to them in their brief. There are, however, four cases cited in this note which appear to be in conflict with the *Van Bebber* case. They are the following:

Fred W. Wolf Co. v. Salem, 33 Ill. App. 614;
Dunham v. Griswold, 100 N. Y. 224;
Knowles v. Michel, 13 East 249;
Hanly v. Noyes, 35 Minn. 174.

The first of these cases, *Wolf Co. v. Salem,* 33 Ill. App. 614, was an action by a traveling salesman to cover a balance said to be due for services, commission on sales, and traveling expenses. The court held:

> "When two parties by compromise liquidate and set out at an agreed sum an unliquidated and disputed claim which the one holds against the other, it thus constitutes a valid contract whether the amount stated be paid or not and the only remedy is upon the contract to recover the amount thus liquidated."

The second case, *Dunham v. Griswold,* 100 N. Y. 224, the plaintiff entrusted the defendant with certain securities which were to be sold and the proceeds invested for plaintiff. The defendant sold the securities and converted the proceeds to his own use. He afterwards settled with the plaintiff and an account was stated in which defendant acknowledged that there was $9000 due plaintiff and executed a written agreement to pay that sum. The court held

the plaintiff having made a claim against him, and he having disputed it, and the parties having settled the dispute by agreeing upon the amount due in an account stated which the defendant promised to pay, that promise is founded upon a sufficient consideration and can be enforced against him although he might be able to prove that nothing was in fact due from him.

In *Knowles v. Michel,* 13 East 249; 33 Kings Bench, 366, plaintiff sold to defendant some standing trees. This defendant agreed to pay nine guineas for; the court held that under these circumstances an account stated was shown, there being no other item of account between the parties.

In *Hanly v. Noyes,* 35 Minn. 174; 28 N. W. 189, plaintiff had an unliquidated and disputed claim against defendant for $1500 for extra work done on his house. The parties by way of settlement and compromise liquidated it at $800, which both agreed and assented to as the amount due plaintiff from defendant. On this amount defendant has paid $785. The court held:

> "This was a case of an account stated constituting a valid contract. There was a settlement or liquidation of a disputed account by compromise constituting an obligatory agreement between the parties. There was a promise by the defendant (to pay $800) founded on a good consideration (liquidating a disputed claim) accepted and assented to by plaintiff and

> hence constituting a valid contract whether the amount was paid or not.''

If these cases are held to be in conflict with the authorities above cited holding that an account cannot be stated upon an unliquidated demand, then we submit that the latter authorities should be accepted as controlling because they are later in point of time, because the opinions are scholarly and carefully written and because they touch the precise point here involved. To our mind, however, the distinction between the cases quoted and the case at bar is plain. In each of these cases the parties plaintiff and defendant had agreed upon a specific amount to be paid by the plaintiff to defendant in satisfaction of plaintiff's claim. The unliquidated amount became liquidated by specific agreement of the parties. The complaint in the case at bar does not allege that an agreement to pay a stipulated amount was reached between the parties as to the amount due to plaintiffs in error by the defendant in error so as to make a new contract. The allegation of the complaint is that an account ''was stated'' by virtue whereof the sum of $853.99 on the first count and $677.82 on the second count was found to be due.

To illustrate our point we quote paragraph IV of the amended complaint:

> ''That at the close of the open season of 1907 a controversy arose between the plaintiffs and the defendant concerning the failure of the de-

> fendant to deliver to plaintiffs a part of the said 1500 tons of merchandise which was adjusted on or about the 6th day of July, 1908, at Fairbanks, and an account was stated between plaintiffs and defendant concerning such adjustment for loss of merchandise by which a balance of $853.99 was found to be due these plaintiffs from defendant which sum defendant then and thereby agreed to pay."

The inference from this allegation is that the controversy between plaintiffs and defendant was adjusted by the account stated and not by a specific agreement between plaintiffs and defendant that the sum of $853.99 should be paid by defendant to plaintiffs.

In reviewing the authorities relied upon by plaintiffs in error we have their statement of a proposition of law that the authorities make a distinction between actions for damages where there is a standard or measure of damages, i. e. a market value and those sounding wholly in tort in which no fixed standard or measure of damages can be resorted to. In support of this statement of the law counsel cites *1 Cyc.,* pp. 364-365-366. This authority states on page 366,

> "It is held that an unliquidated claim for damages cannot form the basis of an account stated."

1 Am. & Eng. Cyc. of Law, p. 441. Here the rule is stated to be,

> "when the account is stated with reference to a single item that item must be of a character

which creates an actual debt between the parties."

3 Encyc. Pl. & Pr., p. 818. This authority discusses form of action for loss or injury to goods during transportation against a common carrier and holds that the action of tort has been dispensed with and that the plaintiff in such a case may declare in assumpsit on the undertaking to carry and deliver safely. Nothing is stated as to an action upon an account stated.

21 Encyc. Pl. & Pr., 1023. Here it is held that the action of assumpsit will lie even where property has not been converted into money or its equivalent.

We are unable to say in what manner the issue in this case is at all affected by these last two citations. The same observation applies to *2 Bliss of Code Pl.,* Secs. 13 and 14. We admit the rule to be that a person having a cause of action for tort may waive the tort and sue in assumpsit, but this principle has no application upon the question whether or not under the facts as given an action upon an account stated will lie.

In *2 Sutherland on Damages,* Sec. 347, the author discusses the proposition of interest on unliquidated damages and the title of the section is "Not Allowed on Unliquidated Demands." The rule stated is that where the damages though unliquidated can be definitely ascertained from market values, suscep-

tible to easy proof, they are not so uncertain as to preclude the recovery of interest.

In Sec. 918 of the same work the author discusses the measure of damages if goods have a market value in actions against carriers, and states the rule to be that the owner may recover the value at the place of destination less the freight. There is nothing said about an action upon an account stated.

Oberndorfer v. Moyer, 84 Pac. 1102. In this case defendant agreed that plaintiff, a mining broker, should purchase stock from him. Plaintiff purchased stock of the agreed value of about $6000, and defendant paid plaintiff on account of such purchase $2500. Defendant refused to pay the balance. Plaintiff after making repeated demands on defendant for payment sold the stock and, after crediting the purchase price, instituted action for the balance of $726.90. A suit was brought on an account stated in this sum. The court holds that the action is properly brought upon an account stated and says:

> "The general rule as to what constitutes an account stated is tersely, and, as we think, correctly stated in 1 Cyc. 364 as follows: 'In general terms where an account is rendered by one person to another showing a balance due from the one to the other, and the indebtedness thus expressed is acknowledged to be due by the person against whom the balance appears, or where parties have previous transactions agree upon a balance as due from one to the other, this will constitute an account stated.'' 1 A. & E. (2nd Ed.) 427 and cases cited; 13 Ency. Pl. & Pr. 87; 2 Greenleaf on Ev. 126.

Sawyer v. Robertson, 28 Pac. 456, appears to be against the contention of plaintiffs in error. It was an action for conversion and the court said:

> "The cause of action arose, according to the complaint, not by virtue of any covenant or agreement or contractual relation existing between the parties, but by the commission of a tort. The remedy for such an injury lies in the application of principles of law which have been aptly termed by an eminent and discriminating jurist 'non-contract law'."

There is nothing in the opinion concerning an account stated.

Terry v. Munger, 24 N. E. 272. This case does not discuss the question of account stated but declares the principle that an owner of goods wrongfully taken may waive the tort and sue on an implied contract of sale.

It will thus be seen that the authorities cited by plaintiffs in error to sustain the contention which they make in their brief are not at all in point. It is not the law that an unliquidated demand may be made the subject of an account stated where there is a fixed standard or measure of damages whereby the amount of damage could definitely be ascertained. An account stated presupposes a fixed amount agreed to be paid and undisputed by the defendant and even in the authorities above referred, which might be construed as favorable to plaintiffs' contention, the unliquidated demand became liquidated by the direct promise of the defendant to pay

the amount whereby a new contract was made taking the place of the unliquidated demand.

In our opinion after a careful investigation of the authorities the complaint in the case at bar would be sufficient in an action upon a liquidated demand, but that in a case such as the one at bar, where the demand was unliquidated, the plaintiff must show the making of a new contract whereby the unliquidated damages became liquidated and whereby the defendant agreed to pay to plaintiffs the precise amount found to be due. In other words an account cannot be stated upon the adjustment but can only be stated upon the promise of the defendant to pay a certain amount admitted to be due to plaintiff. To illustrate our point, paragraph 4 of the complaint would only be sufficient if it was pleaded thus:

> "That at the close of the open season of 1907 a controversy arose between the plaintiffs and the defendant concerning the failure of defendant to deliver to plaintiffs a part of the said 1500 tons of merchandise, which controversy was settled on the 6th day of July, 1908, at Fairbanks, whereby the defendant promised and agreed to pay to the plaintiff the sum of $853.99, and that thereafter an account was stated between plaintiffs and defendant for the sum of $853.99, no part of which sum has been paid."

To constitute a liquidated demand a new contract must be made as of the date that the claim of plaintiff was fixed and agreed upon.

We submit the ruling of the trial court on the demurrer was correct and the judgment should be affirmed.

Dated, San Francisco,
February 26, 1917.

Respectfully submitted,

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